Filed 6/15/12 In re O.T. CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re O.T., a Person Coming Under the Juvenile Court Law. | |
| RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>M.H.,<br><br>Defendant and Appellant. | E054617<br><br>(Super.Ct.No. RIJ119641)<br><br>OPINION |

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Maria H. appeals an order denying her petition pursuant to Welfare and Institutions Code section 388 and terminating her parental rights to her daughter, O.T. We will affirm the order.

## FACTUAL AND PROCEDURAL HISTORY

O.T. was born in August 2010. Her mother, Maria, admitted having used methamphetamine and alcohol during her pregnancy, and O.T. was born somewhat prematurely, at 34 weeks.[1] Maria's two older children had previously been removed from her custody, and O.T. was removed from her parents on August 31, 2010. A dependency petition pursuant to Welfare and Institutions Code section 300[2] was filed on September 2, 2010.

Detention hearings were held on September 3 and September 7, 2010, and O.T. was ordered detained. Maria was given twice weekly visitation and was allowed to provide breast milk and to breast feed as long as she tested clean.

Maria, who was 32 years old, had a history of methamphetamine use since she was 15. She had been enrolled in the Riverside Substance Abuse Program's MOMS program since May 3, 2010, and progress reports from May through August 24, 2010, stated that she was making positive life changes and doing "a great job" in the program's hands-on

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[1] Gestation is normally approximately 38 to 40 weeks. (R. D. Martin, *Gestation period* (2008) AccessScience, McGraw-Hill Companies <http://www.accessscience.com/content/Gestation-period/288400> [as of June 7, 2012].)

[2] All further statutory citations refer to the Welfare and Institutions Code.

child lab. Nevertheless, she had used methamphetamine off and on during her pregnancy with O.T., a period which overlapped her participation in the MOMS program.

At the jurisdiction hearing on September 28, 2010, the court found the following allegations true as to Maria[3] under section 300, subdivision (b): (b-1) "The mother has an extensive and unresolved history of abusing methamphetamines. The mother continued to abuse methamphetamines and alcohol while pregnant with [O.T.], and the mother's prenatal records indicate [alcohol] exposure"; (b-4) "The parents have a history with Riverside County Child Protective Services for substantiated allegations of substance abuse, neglect and domestic violence regarding [Maria's older children]. The [mother was] offered reunification services and the children remain in out of home placement"; (j-1) "The child's siblings . . . have been abused and/or neglected . . . and there is a substantial risk that this child will be abused and/or neglected."

Reunification services were ordered for both parents, and Maria completed her treatment plan goals in the Riverside Substance Abuse Program on October 19, 2010. The program reported that Maria had gained a strong support system while in treatment, had had positive behavioral and lifestyle changes, and that all drug tests were negative. She was "a joy to have" in the program. She still needed to participate in individual therapy and a child abuse/anger management program.

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[3] O.T.'s father, who did not contest the termination of his parental rights, is not a party to this appeal.

From October 22, 2010 until December 4, 2010, the parents had overnight weekend visits with O.T. and her siblings. On December 4, 2010, however, the parents engaged in a domestic violence incident in the presence of the children, including O.T. The children were on an unsupervised visit which was to occur at Maria's sober living home, but they were instead at the father's home. It was reported that during the incident Maria accidentally hit O.T., but both parents denied it. None of the children had any injury. Unsupervised overnight visits ended at that point.

Maria moved back in with O.T.'s father on January 4, 2011, and on January 24, 2011, O.T. was placed with her paternal uncle, Steve, and his wife Rachel. The parents had weekly visits with O.T., supervised by the aunt and uncle. At that point, the Department of Public Social Services opined that the chances of O.T. being returned home by September 29, 2011 were good as long as Maria completed her case plan.

As of March 1, 2011, Maria's weekly visits with O.T. were going well. On March 22, 2011, O.T.'s father was arrested for being under the influence and in possession of drug paraphernalia. He admitted using methamphetamine earlier in the day. The father had lost his house and he and Maria were staying at a motel. On March 29, 2011, Maria tested positive for methamphetamine. She told the social worker that she wanted to enter an inpatient drug program. The social worker concluded that they had not benefitted from reunification services and recommended that services be terminated. Services were terminated at the six-month review on April 12, 2011, and a selection and implementation hearing pursuant to section 366.26 was set.

O.T. appeared to be happy and well adjusted in her placement with her aunt and uncle, who were interested in adopting her. The couple's children supported the adoption. They spoke of O.T. as part of the family and told the social worker how much they enjoyed cuddling and caring for her. The adoptions worker observed that O.T. received a great deal of positive attention from the entire family. Maria continued to visit O.T. She had visited only sporadically for a period after termination of her services, but by July she was visiting about every other weekend. The visits went well.

The day before the section 366.26 hearing, Maria filed a section 388 petition asking the court to vacate the section 366.26 hearing and reinstate her services. In the petition, she stated that she had entered a residential drug program in Northern California on May 31, 2011. She was attending AA/NA meetings, individual counseling, group therapy and parenting classes. She was testing negative in random drug tests. She was also addressing anger management and her pattern of drug dependency. She attached documentation from the program. The program required a minimum of 90 days residency. In its report dated August 6, 2011, the program recommended that Maria have a "continuum" of treatment services to support her recovery process.

On August 10, 2011, at the hearing on the section 388 petition, the court found that Maria appeared to be in the process of changing her circumstances but that the evidence did not support a finding that her circumstances had actually changed. The court also found that vacating the section 366.26 hearing and reinstating services would not be in O.T.'s best interest because her prospective adoptive parents were the only

parents she had ever known and it would not be in her best interest to remove her from that home, particularly in light of Maria's track record of participating in a rehabilitation program and then relapsing.

The section 366.26 hearing was held that same day. The court found that O.T. was adoptable and reasonably likely to be adopted, and that none of the exceptions to the statutory preference for adoption as the permanent plan existed. The court terminated both parents' parental rights.

Maria filed a timely notice of appeal.[4]

## LEGAL ANALYSIS

### 1.

### THE SECTION 388 PETITION WAS PROPERLY DENIED

Maria contends that the juvenile court abused its discretion in denying her section 388 petition because it applied an incorrect legal standard. She contends that the statute permits modification of a prior order if the petitioner shows a "change of circumstances."[5] She contends that the court applied a more stringent test, requiring

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[4] The record on appeal also contains a section 388 petition as to Maria's two other children and a transcript of the hearing on that petition and of the section 366.26 hearing as to those two children. This appeal does not pertain to those children; it pertains solely to O.T.

[5] In pertinent part, section 388 provides:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a

*[footnote continued on next page]*

"changed circumstances." She contends that this improperly rules out "the process of starting to change circumstances" as a permissible basis for modification. She contends that her petition demonstrated that she had begun to change her circumstances, thus justifying vacating the selection and implementation hearing and reinstating reunification services.

We do not agree with Maria that there is a meaningful difference between "changed circumstances" and "a change of circumstances." Both phrases can be understood to mean either a completed change of circumstances or a change which is less than complete. As Maria correctly notes, statutory language must be construed to effectuate the purpose of the law. (*In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360, 366.) The overriding purpose of dependency law is "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2) Moreover, once reunification services have been terminated, the focus of the proceedings shifts from family reunification to furthering the child's needs for permanency and

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*[footnote continued from previous page]*
hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶]

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held . . . ."

stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Consistent with those purposes, courts have long construed the requirement of changed circumstances which may justify modification of an order terminating reunification services to mean that the parent must demonstrate that the circumstances which brought the child into the dependency system have truly changed: "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.] '"[C]hildhood does not wait for the parent to become adequate."' [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We agree with this construction of the "change of circumstances" requirement of section 388.

Substantial evidence supports the finding of the juvenile court in this case that although Maria presented evidence that her circumstances might at last have begun to change, she did not demonstrate a change of circumstances which would justify reinstating reunification services rather than proceeding to terminate parental rights in order to provide a permanent home for O.T. Maria had abused drugs for more than 15 years, beginning at age 15 and including during her pregnancy with O.T. In October 2010, she completed the drug treatment program she was already in when O.T. was detained, but she relapsed in March 2011. She entered a 90-day residential program on May 31, 2011, but had not yet completed it as of the date of the hearing on her section 388 petition. Long-term drug abuse always presents a significant likelihood of relapse,

and a drug user must be "clean" for more than a few months in order to show real reform. Courts have found insufficient evidence of truly changed circumstances based on showings of recent efforts at rehabilitation where the parent was a long-term substance abuser. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [120 days "clean"]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686 [372-day period of abstinence]; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [Fourth Dist., Div. Two] [three-month effort at rehabilitation].) Here, Maria was apparently making significant progress. Nevertheless, the evidence that she had completed a prior program and then relapsed is in itself sufficient to support the trial court's finding that she had not demonstrated a true change of circumstances.

Maria also asserts that the court erred in imposing a requirement that she demonstrate that vacating the section 366.26 hearing and reinstating reunification services was in O.T.'s best interests. She notes that section 388 does not, on its face, require such a finding. However, the California Supreme Court has held that a parent who brings a section 388 petition must show and the juvenile court must find that the proposed change would be in the child's best interest. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 417-418.) We agree with that construction of the statute, but even if we did not agree, we would be bound by our Supreme Court's holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Maria also contends that the juvenile court abused its discretion in denying her petition because the court viewed its options as either maintaining Maria's parental

relationship with O.T. or freeing her for adoption. She points out that permanence could be achieved for O.T. by placing her in a guardianship with her aunt and uncle while concurrently allowing Maria to continue her efforts at rehabilitation with the prospect of having O.T. returned to her eventually. We cannot, however, say that it was an abuse of discretion for the juvenile court to conclude that because O.T.'s aunt and uncle were the only parents the then 11-month-old child had ever known, it would not be in her best interest to face the prospect of being removed from their care: "'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' [Citations.]" (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.)

We recognize that from Maria's point of view, this is a harsh outcome, particularly in light of her efforts to rehabilitate herself. However, her ability to rehabilitate herself successfully is still questionable, and the courts are required at this juncture to consider above all else O.T.'s need for a permanent, stable home. Accordingly, because the record supports the juvenile court's findings that Maria did not demonstrate a change of circumstances which showed that vacating the section 366.26 hearing and reinstating reunification services would be in O.T.'s best interest, the court did not abuse its discretion in denying her section 388 petition. (*In re Stephanie M., supra,* 7 Cal.4th at pp. 318-319 [abuse of discretion standard applies to ruling on section 388 petition].)

2.

## THE RECORD SUPPORTS THE JUVENILE COURT'S FINDING THAT NO EXCEPTION TO THE STATUTORY PREFERENCE FOR ADOPTION AS THE PERMANENT PLAN APPLIES IN THIS CASE

After termination of reunification services, the focus of juvenile dependency proceedings is on the child's needs, including his or her need for a stable, permanent home. Consequently, the statutory preference for a permanent plan for a dependent child is adoption, and if the court finds that the child is adoptable and is reasonably likely to be adopted, the court must terminate parental rights and order the child placed for adoption unless one of the exceptions provided for in section 366.26, subdivision (c) applies. (§ 366.26, subd. (c); *In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Section 366.26, subdivision (c)(1)(B) provides that even if the court finds that the child is adoptable and that there is a reasonable likelihood that the child will be adopted, the court may nevertheless decline to terminate parental rights if it finds a "compelling reason for determining that termination would be detrimental to the child" including the following: "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.36, subd. (c)(1)(B)(i).)

Here, Maria argued at the section 366.26 hearing that the parental relationship exception applied. She now contends that the juvenile court abused its discretion in finding that the exception did not apply.

The burden of proof is on the party seeking to establish one of the exceptions to the adoption preference. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) In order to prevail in asserting the parental relationship exception, the parent must demonstrate both that he or she has maintained regular visitation and contact with the child and that a continued parent-child relationship would "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. . . . If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; see *In re S.B.* (2008) 164 Cal.App.4th 289, 297.) "[T]he parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits . . . the parent must prove he or she occupies a parental role in the child's life . . . . [Citations.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) The parent must also show more than a relationship which may be beneficial to the child to some degree but does not meet the child's need for a parent. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.)

Maria contends that she met that burden because the record shows that she regularly visited O.T. in foster care when she was an infant and was allowed to breast feed her, and that she continued to visit her, graduating to overnight unsupervised weekend visits from October 22, 2010 until the altercation with O.T.'s father on December 4, 2010. She also states that she "declared, through her attorney, that she

shared a bond with her daughter." She goes to state that "there is no evidence that such a bond does not exist." She asserts that because of this bond, terminating her parental rights would deprive O.T. of a substantial positive emotional attachment such that she would be greatly harmed.

On appeal, we review the court's finding that the parental relationship exception does not apply under a deferential standard which has been articulated as a substantial evidence/abuse of discretion standard: "Broad deference must be shown to the trial judge. The reviewing court should interfere only '"if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." [Citations.]' [Citation.]" (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067; see also *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

Stated another way, in order to compel reversal, the evidence in favor of *not* terminating parental rights must be of "'such a character and weight as to leave no room for a judicial determination that it was insufficient to support [the] finding.' [Citation.]" (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

As noted above, to prevail on the parental relationship exception, the parent bears the burden of proving that such a bond exists. Maria's argument attempts to shift that burden by claiming that there is no evidence that the bond does *not* exist. We find this to be a tacit admission that there is no evidence which compels the conclusion that she and O.T. share a bond of such significance that severing it would cause O.T. great harm or

that preserving it would promote O.T.'s well-being to such an extent as to outweigh the benefits she will derive from a permanent, stable adoptive home. And, our review of the record convinces us that there is no evidence which compels this conclusion. Consequently, we conclude that the juvenile court did not abuse its discretion in finding the exception inapplicable.

DISPOSITION

The order is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.